

PATTI GOLDMAN (WSB #24426)  
AMY WILLIAMS-DERRY (WSB #28711)  
Earthjustice  
705 Second Avenue, Suite 203  
Seattle, WA 98104-1711  
(206) 343-7340  
(206) 343-1526 [FAX]  
pgoldman@earthjustice.org  
awilliams-derry@earthjustice.org

HONORABLE JOHN C. COUGHENOUR

*Attorneys for Plaintiffs*

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON TOXICS COALITION,	)	
NORTHWEST COALITION FOR	)	Civ. No. C01-0132C
ALTERNATIVES TO PESTICIDES,	)	
PACIFIC COAST FEDERATION OF	)	
FISHERMEN'S ASSOCIATIONS, and	)	PLAINTIFFS' MOTION FOR FURTHER
INSTITUTE FOR FISHERIES RESOURCES,	)	ACTION BY DEFENDANT
	)	ENVIRONMENTAL PROTECTION
Plaintiffs,	)	AGENCY TO IMPLEMENT JANUARY 22,
	)	2004 ORDER
v.	)	
	)	NOTE ON MOTION CALENDAR:
ENVIRONMENTAL PROTECTION	)	FRIDAY, JULY 16, 2004
AGENCY, and MICHAEL O. LEAVITT,	)	
ADMINISTRATOR,	)	
	)	
Defendants,	)	
	)	
AMERICAN CROP PROTECTION	)	
ASSOCIATION, et al.,	)	
	)	
Intervenor-Defendants.	)	

PLAINTIFFS' MOTION FOR FURTHER ACTION BY DEFENDANT  
ENVIRONMENTAL PROTECTION AGENCY TO IMPLEMENT  
JANUARY 22, 2004 ORDER (C01-0132C)

*Earthjustice*  
705 Second Ave., Suite 203  
Seattle, WA 98104  
(206) 343-7340

## 1 INTRODUCTION

2 Plaintiffs Washington Toxics Coalition et al. (“WTC”) respectfully ask the Court to order  
3 defendant Environmental Protection Agency (“EPA”) to take further actions to implement the  
4 January 22, 2004 Order’s point of sale notification requirements. Specifically, WTC asks the  
5 Court to order EPA: (1) to notify retail establishments of the point of sale notification  
6 requirements by mail; (2) to provide comparable notice directly to registrants and to instruct  
7 registrants to make pesticide distributors, wholesalers, retailers, brokers, dealers, and others in  
8 privity aware of these requirements; (3) to provide on EPA’s website easily accessible and clear  
9 descriptions of the point of sale notification requirements; and (4) to publish another Federal  
10 Register notice that similarly describes the point of sale notification requirements and that directs  
11 the public to EPA’s website for the point of sale notifications, rather than to an industry website  
12 with extraneous material that denigrates this lawsuit and seeks to counter the content of the point  
13 of sale notifications. Each of these sources of information should clearly describe the Order’s  
14 requirement that retail establishments must make the mandatory point of sale notification  
15 whenever products containing the Urban Pesticides are sold and should list both the active  
16 ingredients and the pesticide products to which the notification requirement applies.

## 17 BACKGROUND

18 In its January 22, 2004 Order, this Court established a point of sale notification  
19 requirement for seven pesticide active ingredients that had been detected frequently by U.S.  
20 Geological Survey in urban salmon streams. Order IV. The Order specifies that the notification  
21 contain a prominent graphic, as well as the “heading “Salmon Hazard” in large and visible font  
22 followed by the statement that: ‘This product contains pesticides that may harm salmon or  
23 steelhead. Use of this product in urban areas can pollute salmon streams.’” Order IV.A.1 & 2.  
24 EPA must develop the point of sale notification. Order IV.B.

1 The Order established three distribution mechanisms for the point of sale notifications  
 2 and the Order's posting requirement, all of which were to take place within 60 days of the  
 3 Order's effective date. First, "EPA must notify retailers that they are to make the mandatory  
 4 point of sale notification set out in Section IV.A whenever products containing the Urban  
 5 Pesticides are sold in Urban Areas subject to this Order." Order IV.B. Second, CropLife must  
 6 distribute the notifications in quantity to sales outlets where lawn and garden products are sold in  
 7 the Urban Areas subject to the Order. Id. Third, EPA must provide copies to state pesticide and  
 8 fish agencies and land grant university extension coordinators and request that they notify certain  
 9 certified applicators. Id. Apart from the point of sale notification requirements, the Order  
 10 requires EPA to inform registrants of the Court's injunction and to instruct them to make  
 11 pesticide distributors, wholesalers, retailers, brokers, dealers, and others in privity aware of the  
 12 injunction. Order VIII.

#### 13 A. EPA's Actions

14 In its March 2004 status report, EPA described the actions it was taking with respect to  
 15 these obligations. First, EPA published a notice in the Federal Register to notify retailers about  
 16 the point of sale notification requirements. The notice provides that retailers in the affected  
 17 urban areas "are to make the point of sale notification whenever pesticide products containing  
 18 these active ingredients are sold," and it directs retailers to [www.pestfacts.org](http://www.pestfacts.org) for copies of the  
 19 point of sale notification. 69 Fed. Reg. 13,836, 13,838 (March 24, 2004) (Exhibit 1). Second,  
 20 EPA notified registrants of the Court's January 22, 2004 Order through another Federal Register  
 21 notice that did not describe the duty to make the point of sale notifications, but stated only that  
 22 the Order required EPA "to develop and facilitate the availability of a point of sale notification in  
 23 urban areas." 69 Fed. Reg. 7,478 (Feb. 17, 2004) (Exhibit 2). While EPA provided both Federal  
 24 Register notices to people who have signed up on an EPA "listserve" list, it did not effectuate

1 any more direct notification to either retailers or registrants.

2 Third, and in contrast, EPA distributed copies of the point of sale notifications by U.S.  
3 mail to state pesticide and fish agencies and land grant university extension coordinators, along  
4 with a request that these entities provide the information to certain certified applicators. Fed.  
5 Def. Status Report at 3. The letter describes EPA's obligation to develop the point of sale  
6 notification and CropLife's obligation to distribute the notifications, but it does not set out the  
7 duty to post the notifications in retail sales outlets. Dear Colleague Letter (March 19, 2004)  
8 (Exhibit 3). Moreover, it indicates that additional point of sale notifications can be obtained  
9 directly from EPA and does not refer to www.pestfacts.org. Id.

10 In addition, EPA indicates that it took additional actions beyond those ordered by the  
11 Court. Thus, EPA posted a question and answer document on its website. That document does  
12 not describe the obligation to post point of sale notifications in urban home and garden stores.  
13 (Exhibit 4). EPA also developed interactive maps, accessible through its website, to assist users  
14 in ascertaining and complying with the Order's buffer requirements.  
15 <http://www.epa.gov/oppfead1/endanger/wtc/maps.htm>. (Exhibit 5).

16 EPA has selectively used its website to convey information about the Court's Order. It  
17 has posted the general Federal Register notice, but not the Federal Register notice devoted to the  
18 point of sale notification requirements, which is the only one that describes the posting  
19 requirement. <http://www.epa.gov/fedrgstr/EPA-PEST/2004/February/Day-17/p3364.htm>. It has  
20 described the buffer requirements in the opening page, in the question and answer document, and  
21 in the posted Federal Register notice. <http://www.epa.gov/oppfead1/endanger/wtc/index.html>.  
22 In contrast, nothing on the website describes the point of sale notification requirements.

23 For a short interval from June 25-29, 2004, immediately prior to the June 29, 2004 status  
24

1 conference, EPA had a brief description of the point of sale notification on its website, as well as  
2 a link to the notification itself (Exhibit 6). This material explained that the Order requires EPA  
3 to develop the notification and CropLife to distribute it, but it never mentions the retailers'  
4 obligation to post the notifications. As of June 30, 2004, this material stopped being available on  
5 EPA's website. As was the case before June 25, 2004, it is no longer possible to obtain the point  
6 of sale notification through EPA's website.

7 B. CropLife's Actions

8 In its March 2004 status report, CropLife represented that it would be distributing the  
9 point of sale notification by U.S. mail to retail sales outlets where lawn and garden products are  
10 sold. CropLife's cover letter is cryptic at best.

11 <http://www.pestfacts.org/watoxics/Urban%20Notification%20POS-1.pdf> (Exhibit 7). It explains  
12 that the letter is being sent at the request of outside counsel, that a Court Order requires CropLife  
13 to distribute the point of sale notification, that applicable pesticides and urban areas are identified  
14 in the Court Order accessible through EPA's website, and that additional point of sale  
15 notifications may be obtained from [www.pestfacts.org](http://www.pestfacts.org). Nowhere does the letter describe the  
16 duty to post the notification or the pesticides covered by that requirement.

17 The website to which the CropLife letter (and EPA's Federal Register notice) refer –  
18 [www.pestfacts.org](http://www.pestfacts.org) – has been developed by RISE, which represents pesticide producers and  
19 suppliers and advocates on their behalf. In early April 2004, the opening page:

20 invites the viewer to "Have Your Say on the ESA!" which urges the viewer to  
21 support a proposed regulation that would weaken protection for endangered  
species from pesticides;

22 presents a fact sheet entitled "Why Pesticides?" touting the benefits of pesticides  
23 without disclosing hazards; and

24 provides a link to a poll purporting to support the caption "Most Americans  
Believe Environmental Groups are 'Too Extreme.'"

1 The site contains a link to an article describing this lawsuit as a “nuisance and distraction” and  
 2 describing environmentalists bringing this type of case as analogous to “fundamentalists engaged  
 3 in a jihad against unbelievers.” Excerpts from the April 2004 version of the website are  
 4 contained in Attachment 2 to Exhibit 8.

5 C. WTC’s Request for Further Notification

6 By letter dated April 9, 2004, WTC sought further notification of the Order’s point of  
 7 sale requirements (Exhibit 8). Specifically, WTC asked: (1) for a new notification to retail  
 8 outlets that specifically delineates the posting requirement as well as the pesticides and pesticide  
 9 products covered by that requirement; and (2) that the directions and notifications needed to  
 10 comply with the Order be available on EPA’s website, so that retailers are not restricted to  
 11 obtaining such information and the notifications from an industry site devoted to promoting use  
 12 and sale of the pesticides.<sup>1</sup> In addition, WTC asked to be consulted in the development of  
 13 actions to comply with the Court’s Order. Neither EPA nor CropLife responded to WTC’s letter.

14 ARGUMENT

15 The actions taken thus far have failed to communicate to retailers the posting  
 16 requirements embodied in the Court’s Order. EPA has used ineffective means of reaching the  
 17 retailers and CropLife’s letter to retailers contained woefully insufficient content to convey the  
 18 Order’s requirements.

19 The result has been an overall lack of implementation of the Order’s point of sale  
 20

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21 <sup>1</sup> WTC also pointed out that the notification included in brighter color print a statement that was  
 22 not required by this Court’s Order. The added statement reads: “This point of sale notification  
 23 was produced in compliance with a January 22, 2004 Court Order, to notify urban users about  
 24 the potential for **some** pesticides to harm fish.” Given that the Order requires that the mandatory  
 statement “shall be highly visible to the purchasers,” WTC asked that the added statement either  
 be deleted or be presented in less visible and prominent print. *Id.*

1 notification requirements. Informal surveys in the San Francisco Bay Area have found point of  
2 sale warnings in only two of the 39 stores surveyed, and one of those stores had only one sign,  
3 even though it had numerous products containing pesticides subject to the urban warning  
4 requirement. Declaration of Scott Taylor (June 30, 2004); Declaration of Todd Steiner (June 30,  
5 2004). In the Seattle-Tacoma area, of 31 stores surveyed, only three had point of sale warnings.  
6 Declaration of Erika Schreder (July 1, 2004).

7 EPA asserts that publishing a notice in the Federal Register fully satisfies its obligation to  
8 notify retailers. However, a Federal Register notice is not a means of dissemination designed to  
9 reach retailers. Indeed, there is no reason to believe retailers routinely consult the Federal  
10 Register in connection with their marketing and display of products. In other contexts, federal  
11 agencies provide notice beyond the Federal Register through means likely to reach the targeted  
12 recipients. See, e.g., Payne v. Block, 714 F.2d 1510 (11<sup>th</sup> Cir. 1983) (addressing notice of  
13 availability of emergency disaster relief loans, including notices to television stations, radio  
14 stations, and newspapers); Uniroyal Chem. Co. v. Thomas, 690 F. Supp. 593, 595 (N.D. Ohio  
15 1988) (EPA published notice seeking contractors in “Commerce Business Daily,” a government  
16 publication listing government procurement and contract solicitations). EPA is not a stranger to  
17 disseminating information through means designed to reach the public or pesticide users. It has  
18 produced numerous publications about pesticide risks and safety, which it disseminates to outlets  
19 likely to reach users. See, e.g., <http://www.epa.gov/pesticides/factsheets/kidpesticide.htm> (EPA  
20 fact sheet entitled “Pesticides & Child Safety”); <http://www.epa.gov/pesticides/food/> (EPA  
21 brochure entitled “Pesticides & Food: What You & Your Family Need to Know”);  
22 <http://www.epa.gov/pesticides/ipm/index.htm> (integrated pest management in schools);  
23 <http://www.epa.gov/oppfead1/Publications/lawncare.pdf> (EPA brochure entitled “Healthy Lawn,”  
24

1 Healthy Environment”).

2 EPA also relied on a Federal Register notice to inform registrants of the injunction, even  
3 though it has other means of communicating more directly with registrants. For example, EPA  
4 could have sent an explicit notification directly to registrants. Indeed, EPA could have  
5 distributed a pesticide-registration notice (“PR Notice”), a type of notification routinely used by  
6 EPA to apprise registrants of label changes that must be made to avoid misbranding. This  
7 mechanism is described in the Fourth Declaration of Aimee Code (Mar. 30, 2003), and recent PR  
8 Notices are accessible through EPA’s website at [http://www.epa.gov/PR\\_Notices/](http://www.epa.gov/PR_Notices/). Not only is a  
9 Federal Register notice less effective than direct notification, but the Federal Register notice  
10 directed to registrants is silent as to the point of sale notification requirements. That is the only  
11 notice that directs registrants to notify their wholesalers and others in the chain of distribution of  
12 the Order’s requirements. Accordingly, EPA has never explicitly directed registrants to inform  
13 its wholesalers, distributors and the like of the point of sale notification requirements.

14 By sending explanatory letters directly to state pesticide and fish agencies and land grant  
15 university extension coordinators, EPA appears to recognize that sending notification by mail is  
16 a more effective means of communication than a Federal Register notice. Nonetheless, EPA  
17 relied solely on the Federal Register to reach retailers and even registrants.<sup>2</sup>

18 CropLife sent its letter directly to retailers, but its letter fell far short of conveying the  
19 information retailers need to understand the nature of the point of sale notification requirements.  
20 CropLife failed to describe the posting obligation nor did it list the covered pesticides and

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21  
22 <sup>2</sup> The letter to state agencies and extension coordinators is no substitute for notice to retailers and  
23 registrants. First, the letter failed to describe the posting requirement and list the covered  
24 pesticides and pesticide products. Second, it asked the state agencies to notify certified  
applicators, but not retailers or others in privity with them.



1 pesticide products. In distributing the point of sale notifications by mail, however, CropLife has  
 2 compiled a list of retail establishments that sell home and garden products in the Urban Areas  
 3 covered by the injunction. The fact that such a list has already been developed would streamline  
 4 the process of providing an additional notice to retailers.

5 Finally, while a website can provide a supplemental means of communication, it is not an  
 6 adequate substitute for direct notification. In any event, EPA has not posted the Federal Register  
 7 notice addressing the point of sale notifications on its website. Nor does its website describe the  
 8 posting duty or provide a link to the point of sale notifications. Mum's the word. Instead,  
 9 through their collective actions, EPA and CropLife have converted an industry website into the  
 10 "official" source of point of sale notifications and web-accessible information about the posting  
 11 requirements. Requiring retailers to obtain point of sale notifications through a website  
 12 conveying anti-environmental and pro-pesticide propaganda threatens to undermine the message  
 13 conveyed in the point of sale notifications and the seriousness of the commands in the Court's  
 14 Order.

15 In an analogous situation in Greenpeace v. NMFS, 106 F. Supp.2d 1066 (W.D. Wash.  
 16 2000), Judge Zilly issued an injunction closing Steller sea lion critical habitat to groundfish trawl  
 17 fishing. NMFS had sought a one-week delay in the effective date of the injunction to enable it:

18 to provide both actual notice and binding legal notice of the exact terms and scope  
 19 of the injunction to all affected persons. This notice is essential to ensure that  
 20 NMFS can enforce the terms of the court's injunction so that no one engages in  
 21 trawl fishing within critical habitat in contravention of the court's order. The  
 22 notice will take several forms, including publishing a Federal Register notice or  
 rule, radio broadcasts on the NOAA weather channel, and notice letters to  
 processors and fishing associations in remote areas of the Gulf of Alaska,  
 Aleutian Islands, and Bering Strait fishing communities.

23 Fed. Defs. Response to Pls. Notice of Filing of Proposed Injunction Order 3 (Aug. 4, 2000)  
 24 (Exhibit 9). When this court made the injunction effective the day after issuance, NMFS

1 prepared a Federal Register notice for immediate filing, but also issued a press release, ran  
 2 hourly broadcasts on NOAA weather radio to publicize the injunction, and placed information on  
 3 the agency website. Fed. Def. Report to the Court on Implementation of the Aug. 7, 2000  
 4 Injunction Order at 2 (Aug. 14, 2000) (Exhibit 10).<sup>3</sup>

5 Similarly, when a court found federal agencies in violation of a statute requiring them to  
 6 make vacant federal properties available to assist the homeless, the permanent injunction  
 7 required the agencies to publish lists of suitable properties in the Federal Register. However, the  
 8 court went further and ordered the agencies to initiate an outreach program to disseminate  
 9 information to homeless providers concerning available properties in their localities. National  
 10 Law Center on Homelessness & Poverty v. Veterans Administration, 819 F. Supp. 69, 71, 74  
 11 (D.D.C. 1993). To comply with this order, the agencies, *inter alia*, sent notices to homeless  
 12 organizations and government officials in the area where vacant properties are located, convened  
 13 regional workshops, prepared publications which they distributed to over 30,000 organizations,  
 14 established a marketing program, and posted notices in local post offices and government  
 15 buildings. *Id.* at 74-75 & n.5.

16 Unless retailers receive additional and clearer information about the point of sale  
 17 notification requirements in this Court's Order, the abysmal implementation record is likely to  
 18 continue. Accordingly, WTC asks the Court to order EPA to take the following actions to ensure  
 19 improved implementation of the January 22, 2004 Order's point of sale notification  
 20 requirements:

- 21 1. Notify retail establishments, by mail, of the Order's requirement to make the  
 22 mandatory point of sale notification whenever products containing the Urban  
 Pesticides are sold.

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23 <sup>3</sup> It is not clear whether NMFS sent letters to processors and fishing associations given that it had  
 24 to convey the terms of the injunction in less than 24 hours.

2. Provide notice directly to registrants of the Order's point of sale notification requirements and instruct registrants to make pesticide distributors, wholesalers, retailers, brokers, dealers, and others in privity aware of these requirements.
3. Provide on EPA's website an easily accessible and clear description of the point of sale notification requirements and the notifications themselves.
4. Publish another Federal Register notice that directs the public to EPA's website, rather than to an industry website, for the point of sale notifications.

Each of these notices should identify both the active ingredients subject to the posting requirements, as well as the pesticide products containing those active ingredients. It is particularly important to inform retailers of the covered pesticide products since the retailers purchase and market the products in that form and may be unfamiliar with the ingredient lists for each product. For example, the Court's Order refers to 2,4-D, a common name for 2,4-Dichlorophenoxyacetic Acid. Yet, pesticide product labels list this ingredient by either, but generally not both, of these names. Similarly, the Court's Order extends the point of sale notification requirement to triclopyr BEE but not to another common triclopyr formulation. The pesticide product ingredient list often fails to identify which formulation of triclopyr is in the product. EPA should inform retailers and registrants of the particular pesticide products covered by the Order's posting requirements because a list of the seven urban pesticide active ingredients might not enable retailers to identify the universe of products containing the ingredients.

Finally, EPA should also be directed to consult with WTC in the development of each of the various notices and materials before they are distributed. Such consultations could enable the parties to identify and resolve any disagreements over the nature of the communications and

1 obviate the need for further Court involvement in these implementation matters.

2 Respectfully submitted this 1<sup>st</sup> day of July, 2004.

3  
4  
5 /s/ Patti Goldman

PATTI GOLDMAN (WSB #24426)

6 AMY WILLIAMS-DERRY (WSB #28711)

Earthjustice

7 705 Second Avenue, Suite 203

Seattle, WA 98104-1711

(206) 343-7340

8 (206) 343-1526 [FAX]

pgoldman@earthjustice.org

9 awilliams-derry@earthjustice.org

10 *Attorneys for Plaintiffs*

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On July 1, 2004, I served a true and correct copy of:

1. Plaintiffs' Motion for Further Action by Defendant Environmental Protection Agency to Implement January 22, 2004 Order;
2. Declaration of Scott Taylor;
3. Declaration of Todd Steiner;
4. Declaration of Erika Schreder; and
5. [Proposed] Order Granting Plaintiffs' Motion for Further Action by Defendant Environmental Protection Agency to Implement January 22, 2004 Order.

on the parties listed below:

Wayne D. Hettenbach  
Wildlife and Marine Resources Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Benjamin Franklin Station, P.O. Box 7369  
Washington, D.C. 20044-7369

**Street Address:**

601 "D" Street, N.W., Mail Room 3033  
Washington, D.C. 20004  
Phone: 202-305-0213  
Fax No. 202-305-0275  
*Attorneys for Defendants*

- ☐ via facsimile
- ☐ via overnight courier
- ☐ via first-class U.S. mail
- ☐ via hand delivery
- ☒ via electronic service by Clerk

J. J. Leary, Jr.  
Leary Franke Droppert  
1500 Fourth Avenue, Suite 600  
Seattle, WA 98101  
Phone: 206-343-8835  
Fax No. 206-343-8895

- ☐ via facsimile
- ☐ via overnight courier
- ☐ via first-class U.S. mail
- ☐ via hand delivery
- ☒ via electronic service by Clerk

*Attorneys for Defendant-Intervenors CropLife America, et al.*

1 Steven P. Quarles  
2 J. Michael Klise  
3 Crowell & Moring  
4 1001 Pennsylvania Avenue, N.W.  
5 Washington, D.C. 20004  
6 Phone: 202-624-2629  
7 Fax No. 202-628-5116  
8 *Attorneys for Defendant-Intervenors CropLife America, et*  
9 *al.*

- ☐ via facsimile  
☐ via overnight courier  
☐ via first-class U.S. mail  
☐ via hand delivery  
☒ via electronic service by Clerk

6 Matthew A. Love  
7 Van Ness Feldman  
8 821 Second Avenue, Suite 2000  
9 Seattle, WA 98104  
10 Phone: 206-623-9372  
11 Fax No. 206-623-4986  
12 *Attorney for Defendant-Intervenor Washington State*  
13 *Potato Commission*

- ☐ via facsimile  
☐ via overnight courier  
☐ via first-class U.S. mail  
☐ via hand delivery  
☒ via electronic service by Clerk

11 Karen Budd-Falen  
12 Budd-Falen Law Offices  
13 300 East 18<sup>th</sup> Street  
14 Cheyenne, WY 82001  
15 Phone: 307-632-5105  
16 Fax No. 307-637-3891  
17 *Attorney for Defendant-Intervenor Washington State Farm*  
18 *Bureau*

- ☐ via facsimile  
☐ via overnight courier  
☐ via first-class U.S. mail  
☐ via hand delivery  
☒ via electronic service by Clerk

15 Joe Mentor, Jr.  
16 James A. Tupper, Jr.  
17 Mentor Law Group  
18 2025 First Avenue, Suite 1100  
19 Seattle, WA 98121  
20 Phone: 206-493-2300  
21 Fax No. 206-493-2310  
22 *Attorneys for Defendant-Intervenor Washington State*  
23 *Farm Bureau*

- ☐ via facsimile  
☐ via overnight courier  
☐ via first-class U.S. mail  
☐ via hand delivery  
☒ via electronic service by Clerk

Cherise M. Gaffney  
 Laurie Beale  
 Stoel Rives  
 600 University Street, Suite 3600  
 Seattle, WA 98101  
 Phone: 206-386-7622  
 Fax No. 206-386-7500  
*Attorneys for Amicus Curiae, Central Garden and Pet Company*

- ☐ via facsimile  
☐ via overnight courier  
☐ via first-class U.S. mail  
☐ via hand delivery  
☒ via electronic service by Clerk

Richard S. Gleason  
 Stoel Rives  
 900 S.W. Fifth Avenue, Suite 2600  
 Portland, OR 97204-1268  
 Phone: 503-294-9349  
 Fax No. 503-220-2480  
*Attorneys for Amicus Curiae, Central Garden and Pet Company*

- ☐ via facsimile  
☐ via overnight courier  
☐ via first-class U.S. mail  
☐ via hand delivery  
☒ via electronic service by Clerk

Kimberly M. McCormick  
 Latham & Watkins LLP  
 8363 Sumanee Place, N.E.  
 Bainbridge Island, WA 98106  
 Phone: 206-780-9064  
 Fax No. 206-780-0338  
*Attorney for Amici Curiae Crompton Corporation and Syngenta Crop Protection, Inc.*

- ☐ via facsimile  
☐ via overnight courier  
☐ via first-class U.S. mail  
☐ via hand delivery  
☒ via electronic service by Clerk

Kenneth W. Weinstein  
 Janice M. Schneider  
 Amy L. Stein  
 Latham & Watkins LLP  
 555 Eleventh Street, N.W., Suite 1000  
 Washington, D.C. 20004  
 Phone: 202-637-2200  
 Fax No. 202-637-2201  
*Attorneys for Amici Curiae Crompton Corporation and Syngenta Crop Protection, Inc.*

- ☐ via facsimile  
☐ via overnight courier  
☒ via first-class U.S. mail  
☐ via hand delivery  
☐ via electronic service by Clerk

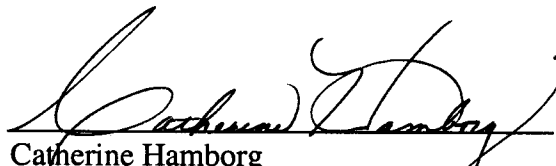
1 Stewart N. Mesher  
2 Howrey Simon Arnold & White, LLP  
3 750 Bering Drive  
4 Houston, TX 77057-2198  
5 Phone: 713-787-1601  
6 Fax No. 713-787-1440  
7 *Attorneys for Amici Curiae, Dow Agrosciences LLC and*  
8 *Makhteshim-Agan of North America, Inc.*

- ☐ via facsimile  
☐ via overnight courier  
☐ via first-class U.S. mail  
☐ via hand delivery  
☒ via electronic service by Clerk

6 David B. Weinberg  
7 Eric Andreas  
8 1299 Pennsylvania Avenue, N.W.  
9 Washington, D.C. 20004  
10 Phone: 202-783-0800  
11 Fax No. 202-383-6610  
12 *Attorneys for Amici Curiae, Dow Agrosciences LLC and*  
13 *Makhteshim-Agan of North America, Inc.*

- ☐ via facsimile  
☐ via overnight courier  
☒ via first-class U.S. mail  
☐ via hand delivery  
☐ via electronic service by Clerk

10 I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and  
11 correct. Executed this 1<sup>st</sup> day of July, 2004, at Seattle, Washington.

12  
13   
14 Catherine Hamborg